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In the Supreme Court of the United States

OCTOBER TERM, 1996

CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Intervenor-Respondent.

BRIEF FOR THE UNITED STATES CATHOLIC CONFERENCE, THE EVANGELICAL LUTHERAN CHURCH IN AMERICA, THE ORTHODOX CHURCH IN AMERICA, AND THE EVANGELICAL COVENANT CHURCH AS AMICI CURIAE IN SUPPORT OF THE RESPONDENT

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QUESTION PRESENTED

Whether the Religious Freedom Restoration Act is a facially valid exercise of congressional power to enforce the Fourteenth Amendment.

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INTEREST OF THE AMICI CURIAE

These *amici curiae* represent diverse religious communities — Catholics, Lutherans, Orthodox Christians and Evangelical Christians — and agree that our Constitution provides affirmative protection for religious exercise, not merely protection from deliberate discrimination against religion. We believe therefore that this Court's contrary conclusion in *Employment Division* v. *Smith* was flawed, and we urge the Court to find the Religious Freedom Restoration Act (RFRA) constitutional. Through their counsel, the parties have consented to the appearance of these *amici*.

SUMMARY OF ARGUMENT

The Constitution protects acts of religious exercise even when they contravene neutral laws of general applicability. The text, history, purpose, tradition, and precedent of free exercise protection in this country all lead to the conclusion that the Free Exercise Clause prohibits even generally applicable laws that impose a substantial burden on the exercise of religion. Because RFRA does no more than restate the import of the Free Exercise Clause, this Court should uphold the law.

ARGUMENT

This case presents a substantial question under Section Five of the Fourteenth Amendment only if the substantive requirements of the Religious Freedom Restoration Act extend significantly beyond those of the Free Exercise Clause itself. The purpose of this brief is to show that the Free Exercise Clause is not confined to laws that specifically target religious practice as such, but extends as well to neutral laws of general applicability that impose a substantial burden on the exercise of religion, contrary to this Court's recent ruling in *Employment Division* v. *Smith*, 494 U.S. 872 (1990). Any Justice who agrees with this interpretation of the Free Exercise Clause should vote to sustain the Act on that ground.

We will show that the great weight of the evidence — based on the text, history, purpose, tradition, and precedent of free exercise protection in this country — supports the broader interpretation adopted by Congress in RFRA rather than the narrower interpretation adopted for purposes of constitutional judicial review in *Smith*. But it is not necessary to go that far. In *Smith*, this Court was reviewing the act of a sovereign state, which is entitled to the presumption of constitutionality. If the two competing interpretations of the Free Exercise Clause were in

equipoise — each supported by substantial arguments based on text, history, purpose, tradition, and precedent — the principle of judicial restraint militated in favor of deferring to the legislature and upholding the state law in *Smith*. In this case, however, the Court is reviewing the facial constitutionality of RFRA; that Act of Congress is now entitled to the presumption of constitutionality. Under the same principles of judicial restraint that informed the *Smith* decision, the Court in this case must resolve any doubts in favor of the constitutionality of RFRA.

I. The Language Of The First Amendment Does Not Support The Contention That The Protections Of Free Exercise Are Confined To Discriminatory Laws

The Free Exercise Clause provides that "Congress shall make no law * * * prohibiting the free exercise [of religion]." Reading each of the key terms — "exercise," "free," and "prohibiting" — in accordance with 18th century (as well as current) meaning, the Clause is most naturally understood as protecting the exercise of religion from *all* forms of government hindrance or interference, rather than as protecting the exercise of religion from discriminatory acts only.[1]

"Exercise." Despite intimations in earlier opinions,[2] it is now generally accepted that the Free Exercise Clause, by its plain terms, extends to conduct as well as belief. "Exercise" means conduct — "the performance of (or abstention from) physical acts." *Smith*, 494 U.S. at 877; see Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755, reprinted 1979).[3] Any interpretation that fails

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[1] Much ink has been spilled on the definition of "religion," but that issue is not relevant to this case. The first word of the Amendment, "Congress," is also important, but after incorporation through the Fourteenth Amendment, we will assume that this word refers to all governmental actors.

[2] E.g., *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878).

[3] For a more detailed discussion of this point, see Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 Harv. L. Rev. 1409, 1488-1490 (1990).

to give protection to the "exercise" of religion is textually indefensible. Yet there is serious danger that, if RFRA is held unconstitutional, states will be able to evade the protections of the Free Exercise Clause by casting their prohibitions in neutral form.[4]

"*Free*." According to the leading dictionary of the day, the term "free" means "[u]ncompelled" or "unrestrained." *Id*. Thus, by the text of the Amendment, the exercise of religion must not be "compelled" or "restrained" by the force of government. There is no hint in any lexicographic source that "free" means "not singled out" or "treated unequally." It means not suffering from governmental compulsion or restraint.

"*Prohibiting*." The term "prohibit" is ambiguous in some contexts,[5] but it does not ordinarily connote discriminatory treatment. Dr. Johnson's dictionary offers the following definitions: "1. To forbid; to interdict by authority * * * 2. To debar; to hinder." *Id*. In conjunction with the term "free," it thus refers to any action of government that forbids or hinders the full and unrestrained practice of religion. RFRA uses the term "burden," which seems roughly synonymous with "hinder." There is no doubt that petitioner in this case is attempting to "prohibit" Archbishop Flores from taking actions he deems necessary and appropriate for the worship of God.

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[4] See *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 386 (1992) (to confine preemptive effect of federal statute to laws "specifically addressed to the airline industry" as opposed to "laws of general applicability" would "creat[e] an utterly irrational loophole"); see also *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47-48 (1987); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 & n.3 (1959).

[5] An example of an ambiguous context is *Lyng* v. *Northwest Indian Cemetery Protective Association*, 485 U.S. 439 (1988), where the government's action hindered or prevented, but did not forbid or punish, religious conduct. For a more detailed discussion of the original meaning of the term "prohibiting," see McConnell, *Origins*, at 1486-1488.

In sum, the most natural reading of the Free Exercise Clause, as it would have been understood by the framers and ratifiers, is that it applies to any law that hinders, proscribes, or restrains religious conduct. See *Smith*, 494 U.S. at 893-894 (O'Connor, J., concurring). This is also its most natural meaning today. If a zoning ordinance restricted land use in a particular neighborhood to "residential uses," and a client asked her lawyer whether an ice cream shop would be "prohibited" there, the lawyer almost certainly would answer in the affirmative. It would not matter that the ordinance was not "specifically directed" (*Smith*, 494 U.S. at 878) at ice cream shops. Similarly, if there were a constitutional provision stating that "Congress shall make no law prohibiting the grazing of cattle on public land," this provision would compel the government to carve out an exception for cattle if Congress passed a law reserving the public land for recreational purposes. By the same token, if a dry county forbade the serving of alcoholic beverages, this would "prohibit the exercise of religion" as applied to a church that served communion wine, even if the law were "generally applicable" and not "specifically directed" at religion.

The alternative interpretation, adopted in *Smith*, appears to confuse the idea of a constitutionally protected *freedom* with the idea of protection against *nondiscrimination*. In the latter context, courts are concerned about whether government "singles out" a particular activity or class of persons, or acts with that forbidden purpose. In the context of freedoms, however, the Constitution protects certain spheres of human activity (property ownership, rights of contractual obligation, speech, and so forth), and the question is whether the government has interfered with that activity. Textually and structurally, the Free Exercise Clause, like the rest of the First Amendment, protects a freedom.[6] It focuses on the effect of the law — whether it hinders the exercise of religion — not on the form or purpose of the law.

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[6] Even in the context of expressive conduct — which, unlike religious exercise, is protected only incidentally — laws not specifically directed at the suppression of free expression are *not* thereby exempted from all scrutiny, but must satisfy intermediate scrutiny. *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968).

We recognize that the Court in *Smith* concluded that the textual interpretation we are defending is not strictly "necessary" and that the nondiscrimination reading is "permissible." 494 U.S. at 878. But unless courts are free to choose among any possible meanings that are not *foreclosed* by the text, it would seem necessary to ask not only what meanings are "permissible," but which meaning is most probable. If, as we maintain, the most natural reading of the language of the Free Exercise Clause is that it protects against all laws hindering the exercise of religion, it would require powerful contrary evidence in the history of the framing or the subsequent interpretive tradition to reject the natural reading. As we will show in the next section, the weight of that evidence supports, rather than contradicts, the natural reading.

II. RFRA Is Consistent With The History And Early Interpretation Of Free Exercise

A. The Framers And Ratifiers Did Not Understand Free Exercise To Protect Only Against Laws Specifically Targeted At Religion

The scope of free exercise protection was not directly debated in the First Congress or the ratifying legislatures. Nevertheless, the language used in those deliberations reflects an expansive understanding of the free exercise guarantee, and suggests no limitation of the sort endorsed by *Smith*. Dissatisfied by the lack of a bill of rights in the original constitution, four of the states proposed an amendment stating that "all men have an equal, natural, and unalienable right to the free exercise of religion[,] according to the dictates of conscience."[7] This broad language suggests an intention to provide the highest degree of protection to this important right, and contains no hint that the protection does no more than prohibit discriminatory laws. Madison proposed a twofold protection: that "[t]he civil rights of none shall be abridged on account of religious belief or worship * * * nor shall the full

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[7] 1 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 334 (J. Elliot, 2d ed. 1896) (Rhode Island); 3 *id.* at 659 (Virginia); 4 *id.* at 244 (North Carolina). The New York proposal differed slightly in wording. 1 *id.* at 327.

and equal rights of conscience be in any manner, or on any pretext, infringed."[8] Since the first half of this proposal guarantees against laws specifically directed against religion (a nondiscrimination idea), the second half must have provided substantive protection to all exercises of the rights of conscience. This conclusion is bolstered by the express statement that these rights should not "be *in any manner* * * * infringed." This language is difficult to square with the idea that only one particular type of infringement — a discriminatory law — was intended to be covered.

Given the lack of directly pertinent legislative history, the most helpful sources are the various state constitutions and colonial charters that contained provisions protecting the free exercise of religion, and the general practice regarding conflicts between civil law and religious conscience.[9] There was little direct discussion or debate about whether the principle of free exercise of religion entails exemptions from civil law. This is hardly surprising. Most 18th Century Americans viewed the spheres of government and

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[8] 1 ANNALS OF CONGRESS 451 (J. Gales, ed. 1834) (June 8, 1789).

[9] Greater detail on the original understanding at the time of adoption of the Free Exercise Clause may be found in McConnell, *Origins*, at 1421-1513; Douglas W. Kmiec, *The Original Understanding of the Free Exercise Clause and Religious Diversity*, 59 UMKC L. Rev. 591, 599-607 (1991); W. Cole Durham, Jr., *Religious Liberty and the Call of the Conscience*, 42 DePaul L. Rev. 71, 80-84 (1992); John Witte, Jr., *The Essential Rights and Liberties of Religion in the American Constitutional Experiment*, 71 Notre Dame L. Rev. 371 (1996). Contrary views may be found in Philip A. Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 Geo. Wash. L. Rev. 915 (1992); Ellis M. West, *The Case Against a Right to Religion-Based Exemptions*, 4 Notre Dame J. of Law, Ethics, and Public Policy 623 (1990); Gerard Bradley, *Beguiled: Free Exercise Exemptions and the Siren Song of Liberalism*, 20 Hofstra L. Rev. 245 (1991); Michael J. Malbin, RELIGION AND POLITICS (1978).

religion as distinct, with little overlap or conflict. The vast majority were Protestant Christians whose religious practice did not conflict with civil law;[10] indeed, Protestant teaching emphasized that the obligation to obey the lawful commands of the sovereign was itself a religious duty. They bridled at suggestions that they were seeking the ability to commit criminal acts.[11] Moreover, the limited scope

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[10] Quakers, the religious sect whose practices were most likely to conflict with civil obligations, largely withdrew from politics in the 1770s and tended not to participate in the movement for greater free exercise protections. William G. McLoughlin, NEW ENGLAND DISSENT, 1630-1833, at 595 (1971). Their concerns, therefore, were not articulated.

[11] The issue of exemptions was most often raised, in exaggerated caricature, by *opponents* of broad religious liberty. For example, William Penn described one of the objections to liberty of conscience as follows: "at this Rate ye may pretend to Cut our Throats, and do all Manner of Savage Acts." William Penn, *The Great Case of Liberty of Conscience*, in 1 A COLLECTION OF THE WORKS OF WILLIAM PENN 457 (London 1726, photo. reprint 1974). Penn's response was to deny that believers sought exemptions from any laws "that atend to Sober, Just, and Industrious Living." *Id.* On the other hand, Penn expressly denied that all enactments called "laws" automatically fell into this category. *Id.* at 458. For other examples, see McConnell, *Origins*, at 1448; Hamburger, *supra* note 9, at 942-945.

Hamburger observes that "dissenters who sought an expanded religious liberty disavowed a right of exemption from civil law" (*id.* at 942), but this overreads the evidence. Certainly, the advocates of expanded religious liberty disavowed any claim of exemption from *all* civil laws (the exaggerated claim made by their opponents), but as Hamburger's examples frequently show, they reserved the right to act according to conscience in the (presumably unusual) case of conflict. For example, see the 1791 sermon of House of Representatives chaplain William Linn ("[t]he members of the Church, indeed, are also members of civil society, and subject to all its laws, *so far as is consistent with a good*

of government — largely confined to peacekeeping and basic public infrastructure — made conflict with religion unusual. The issue of religious exemptions was, therefore, rarely raised explicitly in the debates of the day. This suggests that the modern dichotomy between "generally applicable" and "specifically directed" laws is anachronistic; that is not how our founders conceived of the issues.[12]

Nonetheless, the historical record, on balance, is most consistent with the broader interpretation of the free exercise principle. The advocates of religious freedom in early America — for the most part, intensely religious members of dissenting evangelical sects — were committed to a worldview in which duties to God were superior, in principle, to duties to worldly authorities. To be sure, they did not dwell on the conflict, which seemed to them remote and hypothetical; but their ultimate loyalty was to God over all. This general philosophy underlying the free exercise movement at the Founding was perhaps best articulated by Madison in his *Memorial and Remonstrance Against Religious Assessments*, 2 THE WRITINGS OF JAMES MADISON 183 (Gaillard Hunt, ed. 1901) (reprinted in *Everson* v. *Bd. of Educ.*, 330 U.S. 1, 28, app.

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conscience"). *Id.* at 945 n.113 (emphasis added) (internal quotation marks omitted).

[12] The more salient question, as seen at the time, was whether the protection of free exercise was confined to acts of "worship" or extended to other conduct compelled by religious conviction. See Jack Marietta, THE REFORMATION OF AMERICAN QUAKERISM, 1748-1783, at 226 (1984) (describing arguments by the Philadelphia Quaker society for exemptions from military conscription under the 1701 Charter of Privileges "liberty of conscience" provision); McConnell, *Origins*, at 1459-1461 (discussing differences between state constitutions on this issue). This remained a contested question at the time of adoption of the Fourteenth Amendment (see note 41, *infra*), but the distinction between acts of "worship" and other acts compelled or motivated by religion has not featured in constitutional doctrine in recent decades. Cf. *Widmar* v. *Vincent*, 454 U.S. 263, 269 n.6 (1981) (rejecting as untenable the distinction between "worship" and other speech).

at 63 (1947) (Rutledge, J., dissenting)). The duty to the Creator, Madison wrote, is "precedent both in order of time and degree of obligation, to the claims of Civil Society." *Id.*, ¶ 1.

> Before any man can be considered as a member of Civil Society, he must be considered as a subject of the Governor of the Universe: And if a member of Civil Society, who enters into any subordinate Association, must always do it with a reservation of the general authority; much more must every man who becomes a member of any particular Civil Society, do it with a saving of his allegiance to the Universal Sovereign.

Id. Madison did not say that duties to the Creator are precedent only to laws specifically directed at religion, nor was the principle of religious freedom for which he strived limited to the prevention of deliberate acts of persecution or discrimination. Rather, the principle of free exercise was rooted in the precedence of conscience, which is the duty to God, over lesser obligations.

The purpose of the Religion Clauses was to enable citizens of many diverse creeds to live together in harmony, without violence to their consciences — even if it required the majority to make accommodations, where consistent with public peace and safety. As George Washington expressed the point in a letter to a group of Quakers:

> [I]n my opinion the conscientious scruples of all men should be treated with great delicacy and tenderness; and it is my wish and desire, that the laws may always be as extensively accommodated to them, as a due regard for the protection and essential interests of the nation may justify and permit.[13]

This desire to "accommodate" faiths at odds with the majority is the most important distinguishing feature of American church-state "separation." By contrast to the anticlerical disestablishment proceeding at roughly the same time in France, religion in America

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[13] Letter from George Washington to the Religious Society Called Quakers (Oct. 1789), in GEORGE WASHINGTON ON RELIGIOUS LIBERTY AND MUTUAL UNDERSTANDING 11 (E. Humphrey, ed. 1932).

was set apart because of its central importance to the lives of the people. Religion was not submerged in secular society, as in France, nor subordinated to majoritarian secular concerns. Instead, the First Amendment extended special and emphatic constitutional protection to the full and free exercise of religion, achieving the desire of Washington and Madison (along with many others) to ensure that "the laws may always be as extensively accommodated to [religious minorities], as a due regard for the protection and essential interests of the nation may justify and permit." RFRA stands as the modern expression of this commitment of our founding fathers.

Although conflicts between religious convictions and civil law rarely arose, the conflicts were typically resolved by granting exemptions to the religious objectors. The most common exemptions were from oath requirements, military conscription, and religious assessments.[14] The nearly universal practice of exempting Quakers and other religious pacifists from military service demonstrates that exemptions were a common and familiar response to conflicts between religious practice and civil obligation.[15] It has

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[14] See generally McConnell, *Origins*, at 1466-1473.

[15] Professor Ellis West, a critic of free exercise exemptions, offers three reasons why the practice of exemptions from conscription should not be understood to support a more general principle. Ellis West, *The Right to Religion-Based Exemptions in Early America: The Case of Conscientious Objectors to Conscription*, 10 J. L. & Relig. 367, 376-377 (1994). None of the reasons withstands scrutiny. First, he points out that "the exemptions were granted by legislatures, not courts." *Id.* at 376. Of course. The exemptions of the colonial and revolutionary periods took place before the Constitution (even before the state constitutions), and before judicial review. The point of this pre-constitutional history is to understand the experience against which the framers and ratifiers would view the proposed Amendment.

Second, West notes that "persons seeking exemptions * * * did not necessarily argue that the legislatures were legally or morally bound by either natural law or a constitution to grant the

been suggested that these were granted as a matter of "sympathy," political influence, or other public policy concerns rather than out of a respect for the principle of freedom of conscience,[16] but the language used belies this suggestion. For example, when the Continental Congress recommended exempting from conscription those "who, from religious principles, cannot bear arms," it did so to avoid "violence to their consciences."[17] See Witte, *supra* note 9, at 389-394, for numerous examples of the invocation of "liberty

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exemptions." *Id.* at 376. Prior to adoption of formal constitutional protections, people made whatever arguments they could. Their principal argument was that the legislature should not violate religious conscience (as West's own evidence demonstrates, see, *e.g.*, *id.* at 387-391). West's assumption that dissenters' use of terms such as "privilege" and "indulgence" proves they were not making claims of right (*id.* at 377) is anachronistic. The term "privilege" is a constitutional term meaning "right," as is evident in the language of the Privileges and Immunities Clause of Article IV. The term "indulgence," in English legal usage, simply meant "exemption." See McConnell, *Origins*, at 1428 & n.95.

Third, West asserts that "even when specific constitutional provisions were cited as the reasons for granting exemptions one cannot infer that the exemptions were sought as 'rights' in the modern sense of the word." Rather, he says, such provisions "were thought of as statements of goals or ideals that a government was obligated to realize as much as it could." West, *Exemptions*, at 377. The framers may not fully have grasped the idea of judicially enforceable "rights" in its modern form, but there is no historical basis for reducing the Bill of Rights to the status of goals or ideals, and certainly no reason for giving the rights of free exercise less legal protection than other provisions of the Bill of Rights.

[16] *E.g.*, Hamburger, *supra*, at 929; West, *Exemptions*, at 376-377.

[17] Resolution of July 18, 1775, reprinted in 2 JOURNALS OF THE CONTINENTAL CONGRESS, 1774-1789, at 189 (W. Ford, ed. 1905, photo. reprint 1968).

of conscience" in the years preceding the Constitution. To be sure, at this juncture, the principle of liberty of conscience was not a *constitutional* principle (how could it be?); it was, nonetheless, the same principle of political morality that was later embodied in the First Amendment. The *means* by which this principle had been effectuated in the recent past (including exemptions from generally applicable civil obligations) informed the expectations of the framers and ratifiers about the meaning of the principle when it was constitutionalized in the First Amendment.

The relative lack of controversy over the Free Exercise Clause in the First Congress (in marked contrast to its establishment counterpart) may be attributable to the fact that every state in the Union (with the exception of Connecticut, which continued to operate under royal charter) had adopted some version of a Free Exercise Clause in its state constitution by 1789. It is reasonable to infer that most framers and ratifiers expected the Clause to mean roughly what similar provisions had meant at the state level.

The state constitutional provisions typically were lengthier and more detailed than the federal. While their precise language varied, almost all of them had a common structure: a guarantee of free exercise (or liberty of conscience), coupled with a caveat or proviso limiting the scope of protection.[18] The New York Constitution of 1777, for example, provided:

> [T]he free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed, within this State, to all mankind: *Provided*, That the liberty of conscience, hereby granted, shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State.[19]

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[18] Each of the provisions quoted below, and the other state constitutional provisions, can be found in Benjamin Poore, ed., FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE UNITED STATES (1878), and are reprinted in McConnell, *Origins*, at 1456-1457 & n.242.

[19] The terms "discrimination" and "preference" in this provision

The New Hampshire Constitution of 1784 provided:

> Every individual has a natural and unalienable right to worship GOD according to the dictates of his own conscience, and reason; and no subject shall be hurt, molested, or restrained in his person, liberty or estate for worshipping GOD, in the manner and season most agreeable to the dictates of his own conscience, * * * provided he doth not disturb the public peace, or disturb others, in their religious worship.

The Maryland Declaration of Rights of 1776 provided:

> [N]o person ought by any law to be molested in his person or estate on account of his religious persuasion or profession, or for his religious practice; unless, under colour of religion, any man shall disturb the good order, peace or safety of the State, or shall infringe the laws of morality, or injure others, in their natural, civil, or religious rights.

The Georgia Constitution of 1777 provided:

> All persons whatever shall have the free exercise of their religion; provided it be not repugnant to the peace and safety of the State.

The existence of these "peace and safety" provisos strongly suggests that the state constitutional provisions were understood to require exemptions for religious conscience. In a regime where all generally applicable laws are enforced even against contrary religious conscience, there is no need to specify that the right should not be "construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State" (quoting the New York provision). In such a regime, the provisos would be redundant. Only if religious conscience *overrides*

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did not delimit the scope of the liberty, but ensured that the liberty would be extended nonpreferentially to all denominations. To the extent that the lack of constitutional protection against generally applicable laws has the effect of "plac[ing] at a relative disadvantage those religious practices that are not widely engaged in" (*Smith*, 494 U.S. at 890), this violates the spirit of *equality* as well as *freedom* evinced by these early provisions.

generally applicable law (at least in some cases) do the provisos have legal significance.

Under this interpretation, the state clauses announce a broad right of free exercise of religion — superior to ordinary legislation just as freedom of speech and just compensation for takings of property are superior to ordinary legislation — but exclude from this freedom certain essential laws of the state: those protecting basic public order and the rights of others. (In some states, a broader class of laws is exempted from the free exercise protection, typically laws relating to licentiousness or immorality.[20]) By the same token, Madison, the principal author of the First Amendment, stated late in life that free exercise should prevail "in every case where it does not trespass on private rights or the public peace."[21] These formulations are strikingly similar to the Religious Freedom Restoration Act, except that instead of specifying particular categories of law that override free exercise rights, the drafters of RFRA chose to speak of laws that serve a "compelling interest." In practical application, it is likely that the "compelling interest" test will protect much the same class of religious practice that would have been protected under Madison's approach, or under the "peace and safety" provisos of the state constitutions.

One legal historian has offered an alternative interpretation of these provisos. Hamburger, *supra* note 9. Professor Hamburger challenges the above interpretation on two grounds. First, he claims that rather than defining the scope of protected religious exercise, "[t]he caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfull its functions." *Id.* at 918. In other words, the caveats permitted states to withdraw religious freedom *altogether* from those whose *beliefs or actions* (!) threatened the peace and safety of

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[20] See McConnell, *Origins*, at 1462-1466, for a fuller discussion of these differences, and the political theory underlying them.

[21] Letter from James Madison to Edward Livingstone (July 10, 1822), in 9 THE WRITINGS OF JAMES MADISON, *supra*, at 98, 100.

the state. See *id.* at 919 ("instead of implying that the right of free exercise was very extensive * * * the caveats stated the conditions upon which religious liberty could be denied"). Second, Hamburger claims that the "peace and safety" provisos were not understood as limited to basic public order, but encompassed any and all "violation of law." *Id.* at 918.

Before considering the evidence contradicting this interpretation, we pause to note that it offers religious exercise far less protection than it has ever received in this country, and less protection than it receives under *Smith*. Not only are believers obliged to obey all civil law under this interpretation, but if their "beliefs" (not to mention their "actions") are thought to "threaten the capacity of civil society to fulfill its functions," the government is not limited to punishing specific injurious acts, but may suppress the religions that inspire them. As noted below, such an approach was proposed — unsuccessfully — by anti-Catholic forces in New York to permit suppression of that religion. Under Hamburger's view, provisions that history generally regards as a great advance for religious liberty were no advance at all.

Moreover, the Hamburger interpretation is inconsistent with the text of all but a few of the state provisions.[22] For example, when the New York provision stated that "the liberty of conscience, hereby granted, shall not be so construed as to excuse

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[22] Admittedly, the language of a few provisions, such as those of the New Jersey Constitution of 1776 and the South Carolina Constitution of 1778, are susceptible to Hamburger's narrow reading, though there is no evidence (and he presents none) that they were actually read so restrictively. Interestingly, in 1790, while ratification of the First Amendment was in progress, South Carolina adopted language inconsistent with the Hamburger interpretation: "the liberty of conscience thereby declared shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this State." Even assuming that Hamburger is correct about the meaning of the older language, therefore, it is evident that the narrow view of free exercise reflected by that language was in retreat by the time of framing and ratification of the First Amendment.

acts of licentiousness, or justify practices inconsistent with the peace or safety of this State," it did *not* mean that violators of law would forfeit their religious liberty, but only that their religious liberty did not "excuse" or "justify" certain types of illegal act. Other provisions stated that a believer should not be "restrained" or "molested" for his religious acts "provided he doth not disturb the public peace" (New Hampshire), or "unless, under colour of religion, any man shall disturb the public order" (Maryland), or "provided it [the exercise of religion] be not repugnant to the peace and safety of the State" (Georgia). The language of these provisions makes clear that the caveats permit the state to punish specific religiously motivated conduct that is inconsistent with public order; contrary to Hamburger, the caveats do not authorize the states to abrogate all religious liberty for religions the authorities deem dangerous.

The drafting history of two of the state provisions — those of New York and Virginia — confirm our interpretation that the provisos delimit the scope of the liberty (thus indicating that the provisions entailed at least some exemptions from generally applicable laws) rather than authorizing the state to suppress religions. In New York, anti-Catholic forces led by John Jay made repeated unsuccessful attempts to exclude Catholics from protections of the state's free exercise provision. Their first attempt was a proposal that read:

> that free Toleration be forever allowed in this State to all denominations of Christians without preference or distinction and to all Jews, Turks, and Infidels, other than to such Christians or others as shall hold and teach for true Doctrines, principles incompatible with and repugnant to the peace, safety and well being of civil society in general or of this state in particular[,] of and concerning which doctrines and principles the legislature of this State shall from time to time judge and determine.[23]

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[23] This account of the New York drafting history, including all quotations, is taken from John W. Pratt, RELIGION, POLITICS, AND DIVERSITY: THE CHURCH-STATE THEME IN NEW YORK HISTORY 84-90 (1967). See also Charles Z. Lincoln, THE CONSTITUTIONAL

If it had been adopted, this provision would have meant precisely what Hamburger contends the actual state provisions meant: that "[t]he caveats reflected a willingness to allow government to deny the otherwise guaranteed religious liberty to persons whose religious beliefs or actions threatened the capacity of civil society to fulfill its functions." Hamburger, *supra*, at 918. The New York constitutional drafting committee, however, *rejected* Jay's draft, proposing instead that "the free toleration of religious profession and worship shall forever be allowed to all mankind," without limitation. Jay then repeated his attempt on the floor of the Convention, in similar language; but it was again defeated. He substituted a proposal that would deny civil and religious rights to "professors of the religion of the church of Rome" until such time as they were willing to "renounce and believe to be false and wicked" various doctrines regarding papal authority. This was defeated by a vote of 10-19. After that defeat, Jay proposed an entirely different proviso, limiting the scope of the liberty but not restricting its availability: "provided that the liberty of conscience hereby granted, shall not be construed to encourage licentiousness, or be used in such manner as to disturb or endanger the safety of the State." Supporters of free exercise remained suspicious. Gouverneur Morris inquired whether it was the same as Jay's earlier efforts. Only after the majority was persuaded that Jay's new proposal was *not* a restatement of the old was it seriously considered — and even then, the language was tightened to ensure that the proviso referred only to overt actions.[24] This drafting history shows conclusively that the Hamburger interpretation was expressly considered and rejected in New York.

In Virginia, George Mason and James Madison proposed alternative versions of a free exercise provision. Mason proposed "that all men should enjoy the fullest toleration in the exercise of religion, according to the dictates of conscience, * * * unless under color of religion any man disturb the peace, the happiness, or

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HISTORY OF NEW YORK (1906).

[24] Jay did succeed in adding anti-Catholic, but legally meaningless, language to the preamble of the religious freedom provision.

safety of society."[25] Madison objected to this proposal on two grounds: that it referred to "toleration" and that the state interest proviso was too expansive. Madison proposed a substitute that read that "all men are equally entitled to the full and free exercise of religion according to the dictates of conscience." With minor variation, this was adopted. He also proposed that the caveat be altered to read: "unless under color of religion the preservation of equal liberty and the existence of the State are manifestly endangered." The Mason proposal was more restrictive than that adopted by any state other than Delaware; the Madison proposal was more liberal than that adopted in any other state. In the end, the Virginia legislators compromised the proviso issue through silence, adopting the expansive "free exercise" language with no proviso. Presumably, the legislators expected the meaning to lie somewhere between the two extremes set forth by Mason and Madison, and thus to resemble the provisions of the other states.

This episode is highly suggestive for two reasons. First, it suggests that the federal Free Exercise Clause, also drafted originally by Madison and lacking an express "peace and safety" proviso, was expected, like Virginia's free exercise clause, to strike a middle ground between extremely broad and extremely narrow understandings of countervailing governmental interests. Second, it casts further doubt on the Hamburger hypothesis that the provisos authorized suppression of dangerous religions. If Hamburger's interpretation were correct, then George Mason (traditionally regarded as a great civil libertarian) was in favor of a provision that would allow suppression of any religion thought inconsistent with the "happiness" of the state, and elimination of the proviso, rather than being a compromise between the two proposals under consideration, would have amounted to adoption of a view more liberal even than Madison's. Given the tenor of the debate, these conclusions are highly improbable, rendering the premise equally improbable.

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[25] The proposals and speeches quoted in text may be found in Sanford Cobb, THE RISE OF RELIGIOUS LIBERTY IN AMERICA 491-492 (1902).

The most persuasive interpretation of the state precursors of the Free Exercise Clause, therefore, is that they provided substantive protection for religious conduct, except for acts that violate the peace and safety of the state, or the rights of others. That is strikingly similar to RFRA.

B. Between The Bill Of Rights And The Civil War, Judicial Interpretations Of The Free Exercise Principle Were Divided

The courts of five states decided claims for exemptions from generally applicable law during the years between ratification of the Bill of Rights and the Civil War. In two states, exemptions were required under state constitutions; in two states, exemptions were rejected; and in one state, the exemption was denied on the facts without clear statement of law.[26] The only federal free exercise case prior to 1879 was *Permoli* v. *Municipality No. 1*, 44 U.S. (3 How.) 588 (1845), in which the Court held only that the Free Exercise Clause does not apply to state governments.[27]

New York. The earliest state court decision expressly addressing the exemption question was *People* v. *Philips*, Court of General Sessions, City of New York (June 14, 1813), published in William Sampson, THE CATHOLIC QUESTION IN AMERICA (1813, photo. reprint 1974), excerpted in *Privileged Communications to*

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[26] We do not discuss cases involving blasphemy prosecutions, religious tests for testimonial competence, or intrachurch property disputes. Although parties in these cases often raised free exercise claims, they were not claims for exemption from formally neutral laws, and the cases bear more resemblance to modern establishment claims.

[27] It is nonetheless significant that counsel for the city in *Permoli* defended the challenged regulation (a ban on open casket funerals in the French Quarter of New Orleans) on public health grounds, arguing that the restriction was justified by "the law of necessity." 44 U.S. at 601 (argument of counsel). This is roughly equivalent to RFRA's compelling governmental interest test. That argument would have been unnecessary and irrelevant if the *Smith* interpretation of free exercise had been in effect.

Clergymen, 1 Cath. Lawyer 199, 199-209 (1955). A Catholic priest refused to testify in a criminal trial to revelations made by the defendant during confession. The four-judge court, presided over by DeWitt Clinton, mayor of the City, presidential candidate in 1812, and future governor of the State, unanimously ruled that the free exercise clause of the New York Constitution prohibited enforcement against the priest of the generally applicable requirement to give evidence in response to a subpoena. The court interpreted the "peace and safety" proviso of the state constitution as inapplicable, on the ground that the Catholic sacrament of confession does not have a "natural tendency * * * to produce practices inconsistent with the public safety or tranquillity." *Privileged Communications*, *supra*, at 208. The court concluded:

> Although we differ from the witness and his brethren, in our religious creed, yet we have no reason to question the purity of their motives, or to impeach their good conduct as citizens. They are protected by the laws and constitution of this country, in the full and free exercise of their religion, and this court can never countenance or authorize the application of insult to their faith, or of torture to their consciences.[28]

Four years later, another New York court accepted the priest-penitent privilege established in *Philips*, but denied the motion of a criminal defendant to bar testimony of a Protestant clergyman on the ground that the clergyman had no objection, under the canons of his church, to testifying.[29] Shortly thereafter, the New York legislature codified the priest-penitent privilege, commenting that the *Philips* decision "is believed to have received general approbation in this country."[30] The New York statute became the national model.

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[28] *Id.* at 209.

[29] *People* v. *Christian Smith*, 2 City Hall Recorder (Rogers) 77 (N.Y. 1817), reprinted in *Privileged Communications*, *supra*, at 209.

[30] *Extracts from the Original Reports of the Revisers*, REVISED STATUTES OF THE STATE OF NEW YORK (1836).

Massachusetts. In 1818, the Supreme Judicial Court of Massachusetts rejected the motion of a criminal defendant to exclude evidence of an open confession he had made to the congregation. *Commonwealth* v. *Drake*, 15 Mass. 161 (1818). The prosecutor argued that the confession was "purely voluntary" and was not made pursuant to "any known ecclesiastical rule." *Id.* at 161-162. Because the court's opinion did not reveal whether the decision was based on the facts or on the law, the court's interpretation of free exercise is not ascertainable. It is significant, however, that the reported argument for the prosecution was confined to the factual question whether the confession was religiously compelled, and did not challenge the defendant's interpretation of the state constitution as compelling exemptions in the case of actual religious conflict.

Pennsylvania. In *Commonwealth* v. *Wolf*, 3 Serg. & Rawle 48 (Pa. 1817), the Pennsylvania Supreme Court rejected the claim of a Jewish merchant who sought an exemption from the state's Sunday closing law.[31] The court reasoned that Jewish law did not compel him to work on Sunday and the civil law did not require him to work on Saturday, thus, there was no conflict between religious and civil obligations. As in the Massachusetts case, the court did not dispute the claimant's interpretation of the state constitution as compelling exemptions in cases of actual conflict.

Fourteen years later, however, in *Simon's Executors* v. *Gratz*, 2 Pen. & W. 412 (Pa. 1831), the Pennsylvania Supreme Court squarely held that the liberty of conscience clause does not excuse religious believers from compliance with state law. The court declined to follow the New York *Philips* precedent, concluding that exemptions from generally applicable law are properly a matter of

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[31] An earlier free exercise case was settled before appellate review. *Stansbury* v. *Marks*, 2 Dall. 213 (Pa. 1793). The trial court fined a Jewish witness for refusing to testify on the sabbath, but before the issue could be reviewed by the appellate court, the party waived the benefit of this testimony and the fine was discharged.

legislative policy. *Id.* at 414.[32] "That every other obligation shall yield to that of the laws, as to a superior moral force, is a tacit condition of membership in every society, whether lay or secular, temporal or spiritual, because no citizen can lawfully hold communion with those who have associated on any other terms." *Id.* at 417. This statement reads as if it were a deliberate counterpoint to James Madison's famous *Memorial and Remonstrance*, which affirmed that religious duty "is precedent both in order of time and degree of obligation, to the claims of Civil Society," and that "every man" who becomes a member of civil society "must always do it with a reservation * * * of his allegiance to the Universal Sovereign."[33]

In *Specht* v. *Commonwealth*, 8 Pa. 312 (1848), the Pennsylvania court again rejected a free exercise challenge to a Sunday closing law. The court reiterated the holding of *Simon's Executor*, but then proceeded to rule that the law imposed no more than "an incidental worldly disadvantage" on the claimant and that only if the individual were religiously compelled both to work six days a week and also to observe a day other than Sunday as the sabbath would the court "regard[ ] [this] as an invasion of his conscientious conviction." *Id.* at 326.

Virginia. In *Commonwealth* v. *Cronin*, 1 Quart. L. J. 128 (Va. Richmond Cir. Ct. 1855), a Virginia court relied, *inter alia*, on the New York *Philips* case to find a free exercise exemption under the Virginia Declaration of Rights. A man accused of murdering his wife sought testimony from her priest that, he contended, would prove she was involved in an adulterous relationship. The court found that the priest-penitent privilege is

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[32] The author of the opinion, Chief Justice John Bannister Gibson, is best known for his rejection of constitutional judicial review. *Eakin* v. *Raub*, 12 Serg. & Rawle 330, 344-358 (Pa. 1825) (Gibson, J., dissenting). The emphasis in *Simon's Executor* on division of authority between court and legislature, rather than on the nature of free religious exercise, suggests that the two opinions were jurisprudentially connected.

[33] See pages 8-9, *supra*.

"embraced in the guarantees furnished by our Constitution in favor of religious toleration" and that this exemption did not "violate any principle of public policy." "It is impossible to conceive of more broad and comprehensive terms than are used in our Bill of Rights, and our State and Federal Constitutions," the court observed. *Id.* at 137.

South Carolina. In 1823, the Constitutional Court of South Carolina unanimously rejected a claim by a member of the Covenanters sect for exemption from service on the grand jury. *State* v. *Willson*, 13 S.C.L. (2 McCord) 393 (1823). The court observed that all religions required "a ready obedience to the laws of the country" and held that a "fixed and scrupulous moral objection to the discharge of a duty required by law, which springs conscientiously from the religious tenets of a man, [does not] amount[ ] to a justification for refusing to perform the duty so required." *Id.* at 394, 396.

C. The Framers And Ratifiers Of The Fourteenth Amendment Understood It To Extend To Laws Of General Applicability

In this section, we will show that (whatever may have been the understanding at the Founding) the framers of the Fourteenth Amendment understood and intended the principle of free exercise of religion to extend to all coercive acts of government, including those formally neutral toward religion.[34]

Fourteenth Amendment constitutionalism has its origins in the abolitionist movement. Abolitionism was closely tied to the religious revival known as the Second Great Awakening, and the abolitionists were particularly sensitive to denial of religious freedom to African Americans in the South. One of the most shocking aspects of slavery, according to prominent abolitionists, was that the southern states denied both slaves and free persons of color rights essential to Christian religious practice: the ability to read (which barred access to the holy scriptures), to assemble for

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[34] For more detailed discussion of this issue, see Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 Nw. U. L. Rev. 1106 (1994).

worship or otherwise, and to preach and spread the gospel.[35] John Bingham, principal author of the Fourteenth Amendment, James Wilson, Chair of the House Judiciary Committee at the time of the Amendment, Lyman Trumbull, author of the Civil Rights Act of 1866, and many other leaders in the effort to secure the rights of black citizens after the Civil War, made speeches denouncing such laws on the ground that they were violations of religious conscience.[36] The abolitionist movement also attacked laws against assisting slaves on the ground that those laws violated the liberty of conscience. Bingham, for example, stated:

> Before [the Fourteenth Amendment], a State, as in the case of the State of Illinois, could make it a crime punishable by fine and imprisonment for any citizen within her limits, in obedience to the injunction of our divine Master, to help a slave who was ready to perish; to give him shelter, or break with him his crust of bread. * * * The validity of that State restriction upon the rights of conscience and the duty of life was affirmed, to the shame and disgrace of America, in the Supreme Court of the United States; but nevertheless affirmed in obedience to the requirements of the Constitution.[37]

None of these laws was "specifically directed" at religion; yet they were routinely characterized by the framers of the Fourteenth

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[35] See *id.* at 1133-1137 and sources cited therein.

[36] *Id.* at 1146.

[37] Cong. Globe, 42d Cong., 1st Sess. 84 app. (1871). The final sentence of this passage reflects Bingham's theory that the most serious deficiency in the original Constitution was the lack of congressional enforcement authority for the Privileges and Immunities Clause of Article IV. See Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 Yale L.J. 57 (1993). As this passage shows, Bingham believed that the Fourteenth Amendment remedied this deficiency. This would protect against the violations of conscience to which Bingham referred, however, only if the incorporated free exercise right is understood to apply to generally applicable laws.

Amendment as violating the liberty of conscience. When the framers of the Fourteenth Amendment extended the protections of the First Amendment to state laws, it was these examples of free exercise violations that they had in mind.

The exemptions issue became the subject of explicit debate in the Reconstruction Congress in connection with the bill that ultimately was enacted as the Civil Rights Act of 1875. In its earlier versions, the Act would have outlawed discrimination (including segregation) within a variety of institutions, including inns, railroads, places of public accommodation, cemeteries, benevolent institutions, *and churches*.[38] Since this bill was not "specifically directed" at religion, but extended to all comparable organizations, including "benevolent institutions," it would not raise a free exercise problem under the rule of *Smith*. A number of distinguished members of Congress, however, including Matthew Carpenter (who argued the first Supreme Court case under the Fourteenth Amendment), Oliver Morton, and Frederick Frelinghuysen, argued that this restriction violated the First Amendment.[39] "People have a right to say how they will worship, what they will worship, and with whom they will worship, and if they have a right to say how they will worship, and with whom they will worship, then under the Constitution of the United States you cannot pass this provision with regard to churches," said Morton.[40] "I look on it as an infringement of the Constitution," said Frelinghuysen.[41]

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[38] See Lash, *supra* note 36, at 1154; Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 Va. L. Rev. 947, 1050-1051 (1995).

[39] Cong. Globe, 42d Cong., 2d Sess. 759 (Sen. Carpenter); *id.* at 847-848 (Sen. Frelinghuysen); *id.* at 898 (Sen. Morton); see also *id.* at 897-898 (Sen. Corbett); *id.* at 897 (Sen. Anthony); *id.* app. at 10 (Sen. Saulsbury); *id.* app. at 5 (Sen. Lot Morrill).

[40] *Id.* at 898 (Sen. Morton).

[41] *Id.* at 896. In contrast to both *Smith* and RFRA, Frelinghuysen argued that the Free Exercise Clause protects only

Charles Sumner, the sponsor of the bill, argued that since it was not directed at religion but rather imposed a neutral principle of law upon all incorporated associations, the bill was not unconstitutional:

> To my mind this is simply a proposition to apply to an incorporated association the great principles of our Government, and it does not in any respect interfere with religion, or tend in the least that way.[42]

Thus, the two views of the Free Exercise Clause — that of RFRA, and that of *Smith* — were clearly presented, and were debated in expressly constitutional terms. Sumner's view — the view taken in *Smith* — lost, and the bill was amended to exclude churches from its scope.[43] This is strong evidence that, at least by the time of Reconstruction, the principle of free exercise was understood to apply to all laws that infringed on religious practice, and not just to those targeted at religion.

III. RFRA Is Consistent With The Great Majority Of This Court's Precedents Interpreting The Free Exercise Clause

It cannot be said that the rule of *Smith* — that the Free Exercise Clause provides no protection against formally neutral laws of general applicability — is deeply rooted in this Court's interpretations of the First Amendment. Indeed, the Court's first statement of that rule occurred only in 1940, in Justice Frankfurter's opinion for the Court in *Minersville School District* v. *Gobitis*, 310 U.S. 586, 595 (1940). *Gobitis* was overruled three years later, in *West Virginia Bd. of Educ.* v. *Barnette*, 319 U.S.

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acts of "worship" and not all "external conduct." *Id.* at 847.

[42] *Id.* at 896; see also *id.* at 611; *id.* at 823-826; *id.* at 843 (Sen. Sherman).

[43] *Id.* at 899. The vote was close (29-24), but this is because opponents of the entire Civil Rights bill voted against the amendment in order to make the measure as "obnoxious" as possible, as they frankly admitted. *Id.* at 897 (Sen. Trumbull); *id.* at 897 (Sen. Thurman).

624 (1943). In no other majority opinion prior to *Smith* did the Court hold that the Free Exercise Clause does not apply to generally applicable laws, and even the author of *Gobitis* later abandoned that position.

To be sure, in several cases prior to *Gobitis* the Court rejected free exercise claims — but not on the ground that the laws complained of were neutral or generally applicable. In *Reynolds* v. *United States*, 98 U.S. 145 (1879), the Court relied on the proposition — rejected in *Smith* and contradictory to the plain language of the Amendment — that the First Amendment extends its protection to matters of "religious belief and opinions" but not to "practices." *Id.* at 166; see also *id.* at 164. That *Reynolds* did *not* distinguish between "generally applicable" laws and laws "specifically directed" at religion is evident from its extension in subsequent cases to laws *specifically directed* at the Mormon religion. *Davis* v. *Beason*, 133 U.S. 333 (1890) (upholding requirement that voters take an oath that they are not members of an organization that teaches polygamy); *The Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States*, 136 U.S. 1 (1890) (upholding a statute revoking the charter of the Mormon Church and confiscating its property).

In *Prince* v. *Massachusetts*, 321 U.S. 158 (1944), the Court held that child labor laws prohibited, and the Free Exercise Clause did not protect, the right of a nine year old Jehovah's Witness to distribute religious literature in the company of her guardian. The Court made no reference to the general applicability of the statute; indeed, it plainly stated that the law would be unconstitutional if applied to adults. *Id.* at 167. Rather, the Court concluded that "[t]he zealous though lawful exercise of the right to engage in propagandizing the community, whether in religious, political, or other matters, may and at times does create situations difficult enough for adults to cope with and wholly inappropriate for children * * * to face." *Id.* at 169-170. *Prince*'s analysis of the free exercise right thus bears no resemblance to that of *Smith*.

In several cases involving indirect forms of military service, the Court rejected free exercise claims. See *Hamilton* v. *Regents*, 293 U.S. 245 (1934) (free exercise objection to ROTC requirement at state university rejected); *United States* v. *MacIntosh*, 283 U.S. 605 (1931) (denial of naturalization on ground of refusal to commit

to fight upheld). In none of these cases did the Court invoke anything resembling the *Smith* interpretation of free exercise; the opinions emphasized, instead, the extraordinary importance of military obligations. *Hamilton*, 293 U.S. at 262-263; *MacIntosh*, 283 U.S. at 620-621.

It was in these cases that four of the most highly regarded Justices ever to serve on this Court — Chief Justice Hughes and Justices Holmes, Brandeis, and Stone — had this to say about the principles and traditions of the Free Exercise Clause:

> [I]n the forum of conscience, duty to a moral power higher than the state has always been maintained. The reservation of that supreme obligation, as a matter of principle, would unquestionably be made by many of our conscientious and law-abiding citizens. The essence of religion is belief in a relation to God involving duties superior to those arising from any human relation. * * * One cannot speak of religious liberty, with proper appreciation of its essential and historic significance, without assuming the existence of a belief in supreme allegiance to the will of God. * * * The battle for religious liberty has been fought and won with respect to religious beliefs and practices, which are not in conflict with good order, upon the very ground of the supremacy of conscience within its proper field. What that field is, under our system of government, presents in part a question of constitutional law and also, in part, one of legislative policy in avoiding unnecessary clashes with the dictates of conscience.

MacIntosh, 283 U.S. at 633-634 (Hughes, C.J., dissenting). RFRA stands in this tradition — what Hughes called "our happy tradition" (*id.* at 634) — of avoiding "unnecessary clashes" between religious conscience and civil law, by granting exemptions in cases where the government has no compelling interest in coercing obedience.

In *Braunfeld* v. *Brown*, 366 U.S. 599, 606 (1961), the Court upheld application of a Sunday closing law to a Jewish merchant on the ground that it constituted "only an indirect burden on the exercise of religion," by which the Court meant a law that makes the religious practice more costly but not illegal. The Court hastened to add — confusingly — that even "indirect" burdens may

be unconstitutional if the "purpose or effect of a law is to impede the observance of one or all religions." *Id.* at 607. The Court also imposed a requirement of least restrictive burden even with respect to "indirect" burdens. In these respects, RFRA can best be understood as a tightening of the *Braunfeld* standard.

Indeed, no Justice in *Prince*, *Braunfeld*, or the military cases interpreted the Free Exercise Clause as exempting generally applicable laws from judicial scrutiny. Even Justice Frankfurter, in *Braunfeld*, retreated from his position in *Gobitis*. In the case of a neutral and generally applicable law, he stated that the court should apply a balancing test: "If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained." *McGowan* v. *Maryland*, 366 U.S. 420, 462 (1961) (Frankfurter, J., concurring in *Braunfeld* and related cases); see also *id.* at 520.

In 1963, the Court formally adopted the constitutional test now embodied in RFRA. *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972), the Court stated that a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for government neutrality if it unduly burdens the free exercise of religion."[44] Between *Sherbert* and *Smith*, the Court applied that test in at least ten cases. See *Church of the Lukumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 564-571 (1993) (Souter, J., concurring) (discussing cases). As Justice Scalia characterized the precedent in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1, 38 (1989) (Scalia, J., dissenting) (emphasis in original): the Court has "held that the Free

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[44] The *Smith* opinion distinguished *Yoder* on the ground that it was a "hybrid" case — a combination of free exercise and parental rights. 494 U.S. at 881-882. That was not the basis for decision set forth in the *Yoder* opinion. In any event, every free exercise claim can be characterized as a "hybrid" with some other constitutional claim: free speech, privacy, property, and so forth.

Exercise Clause of the First Amendment *required* religious beliefs to be accommodated by granting religion-specific exemptions from otherwise applicable laws." See also *Edwards* v. *Aguillard*, 482 U.S. 578, 617 (1987) (Scalia, J., dissenting) (characterizing five cases as holding that "in some circumstances States must accommodate the beliefs of religious citizens by exempting them from generally applicable regulations").

* * * *

The interpretation of the Free Exercise Clause reflected in RFRA, therefore, is based on the plain language of the constitutional provision, accords with the historical evidence regarding the First and Fourteenth Amendments, and is consistent with the great weight of precedent. Plainly, Congress has engaged in a reasonable, well-supported, nonpretextual attempt to enforce the requirements of the Fourteenth Amendment.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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